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APOLOGY

FOR THE

East-India Company:

With an Account of some large Pre-rogatives of the Crown of *England*, anciently exercised and allowed of in our Law, in Relation to foreign Trade and foreign Parts.

By *W. A.* Barrister at Law, Author of the first Answer to the late chief Justice *Herbert's* Defence of the Dispensing Power.

Qui judicium fecerit parte inauditâ alterâ, æquum licet statuerit haud æquus est Judex.

London, Printed for the Author, 1690.

YOUS, NO 1-1-11

to have been born to various
regions of the world

10 330

A N
A P O L O G Y
F O R T H E
East-India Company.

THE Substance of what follows was intended *Introduction.*
to be spoken by me before a *Committee* of
the late House of *Commons*; but my *An-*
cients at the Bar, thought it better to rely
upon the supposed Defect of Proof for the Mat-
ters alledged against the *East-India Company*, than
to justify the Fact; which if proved, and not de-
fended, was likely to have that Consequence which
is well known to have hapned.

I have here considered all the Objections which
have occurred to me against the Exercise of such
Powers, as 'tis not to be denied but the Company
thought were warrantable.

I urge not this as if an Act of *Parliament* for
settling convenient Powers were needless, or not de-
sired by them; but to shew that those their Acti-
ons which have been most complained of, have not
been without Precedent and Countenance from *Le-
gal Authorities*.

First Charge.

I. The two great Charges against the Company, ~~are the seizing of Ships and Goods of Interlopers,~~ and condemning them as forfeited.

Second Charge.

II. The passing Sentence of Death, and executing Men, by the Governor at St. *Helena*, in a Method not wholly agreeable to the Laws of *England*, or else the procuring a Commission from the King, for trying and executing Men there, by *Martial Law*.

First seizing
Ships and
Goods.

I. That in relation to Ships and Goods seems the less likely to be according to Law, since it was not justified in the time when *Jefferies* was *Chief-Justice*, and the King's Power even for prohibiting, labours with the Disadvantage of having Judgment for it in irregular times; and the Grounds on which most weight was laid, suitable to such times. As,

False Mediums
formerly used.

1. A *Prerogative* to forbid Trade with *Infidels*, who remaining perpetual Enemies to the Nation, yet were to be Friends to part: and this upon a Principle that would restrain the Propagation of the *Gospel*, as well as of Trade; as if the Danger of being infected with their Infidelity were greater than the hopes of converting them: or that they who were free of such a Company had a particular Antidote against it.

2. The other ground, though not so ridiculous, has less colour of Law, which was the King's Power, for the benefit of particular Persons, to dispense with *Acts of Parliament* restraining Trade; from whence they would infer an equal Power of restraining, where *Common or Statute Law* gave a Liberty. But without the help of such false Mediums, I doubt not to prove very plainly, that
neither

neither Common nor Statute Law, give any Countenance for *interloping* within the Extent of the *East-India Company's Charter*: and that such as trade thither, not being of the *Company*, or licensed by them, incur the Forfeiture of the Ships and Goods with which they interlope, and that according to the *Law of England*, as it has been taken ever since Foreign Trade appears to have fallen under its Regard.

That the *Company's Charter* and *Proclamations* thereupon prohibit *interloping* upon such Penalties, is not denied: So that the only Question here is, What Countenance such *Prohibitions* have in our Law.

Object. I meet with an Objection in the beginning, as if such a Restraint were against the *Law of Nations*; of which some suppose it to be a *Maxim*, that *Commerce ought to be free*: which is not implied in the publick use of the Sea and Shores allowed in the *Civil Law* to some Purposes: But were it so, care must be taken for such an Interpretation, that one *Maxim* do not thwart another. Wherefore since according to the *Law of Nations*, of those things to which all have equal Right, special Property is acquir'd by *Occupancy*, or *pri-mier Seizin*; The Rule for Liberty of *Commerce* must be qualified so, as not to prejudice that Property, which has been acquired and improved at the Expences of others. According to which, in our Law, no Man can use his own to the Damage of his Neighbour's Property first settled. Wherefore, though we say, *cujus est Solum, ejus est usque ad Cælum*; yet a Man may not by building upon his own ground stop up his Neighbours more ancient

Of Liberty of
Commerce.

Vid. Justini.
Inst. de rerum
div. Lib. 5.

cient Light : Nor yet can he use his own to the Injury of the *Publick*, and therefore cannot turn his Land into a *Park*, *Chace*, or *Warren*, without *Licence* from the *King*, who is intrusted for the *Publick*, to see that all, or a convenient Quantity of the Land usually plowed, be kept in Tillage.

But as to Commerce, there is no ground for the Belief that it ought, by the Law of Nations, to be absolutely free, either between *Nation* and *Nation*, or for all the Subjects of the same *Nation* : for this we must judg either according to natural Equity, or the common Practice of *Nations*. The first is certainly against reaping the Benefit of another's Cost or Labour, and the *Practice of Nations* agrees with it ; imposing Taxes upon Goods imported or exported, and prohibiting Persons and Merchandizes as they see cause. And thus it was with the ancient *Romans*, who had their *Comites Commerciorum* ; Supervisors of Commerce ; who were to see that none traded beyond the Bounds, or with other Merchandizes than were allowed by the Government : And what Freedom of Trade soever might be allowable where it depended only upon a Liberty granted by one Prince to the Subjects of another, all standing in equal Capacity as Subjects ; yet where the Circumstances are such, that the Trade must be maintained by Garisons and armed Forces sent by the Traders, there can be no Reason for others to have any Liberty, till they have allowed their Proportion of the Charges. Nor can this be looked upon as a *Monopoly*, odious in the Eye of the Law, till it is proved to be a Restraint of such Trade as others were intitled to by Law.

But

*Vid. Hofmanni
Lexicon Tit.
Com. Commerf.
vid. Justin. Cod.
Lib. 4. Tit. 40.*

No Monopoly.

But to come to those plain Authorities in Law which support the *Companies Charters*, it will appear:

First, That at Common Law the King might prohibit any Person or Persons from going beyond Sea; and is Judg of the Grounds. The *Ne exeat Regnum* is served only upon particular Persons; but *Fitz-Herbert* tells us that the Subject may be prohibited by *Proclamation* as well as by *Writ*, and the Reason given extends to all, because every one is bound to defend the King and his Realm. Wherefore this is rightly explained in *Dyer*, where 'tis said to be agreed by *Fitz-Herbert*, " That the King may by his *General Proclamation*, or *Special Prohibition* restrain his Subjects from going beyond Sea. There is indeed a *Query* put upon the Suggestion in the *Writ*, which in *Dyer* is thought not to be traversable.

The King's Power to prohibit Persons from going out of the Kingdom not restrained to particular Persons.

N. Brev. ne exeat Regum.

Dyer. fo. 165. b.

The Statute which excepts notable Merchants from need of *Licences* to go beyond Sea: 1. Gives no Power against a *Prohibition*. Nor 2. Were any Merchants notable in the Eye of the Law, but those of the *Staple*, which at the beginning were only *Foreigners*, as appears not only by *Magna Charta*, which provides for no other Merchants; but more particularly by the Statute of the *Staple*, which prohibits *English*, *Irish*, and *Welsh*, from carrying *Staple Commodities* out of the Realm. This the King had dispensed with, but our Merchants Denizens not thinking that sufficient Warrant, obtained an Act 34 Ed. 3. to give them the same Liberty with *Foreigners*, which was a manifest Departure from the ancient Policy of the Kingdom, for bringing *Foreign Merchants* with their Monies hither.

Vid. infra 27. Ed. 3.

Vid. Rolls Ab. Tit. Prerog.

Secondly,

The King's
Power in erect-
ing Societies for
Trade and re-
straining others.

21 Jac. I. c. 3.

12 H. 7. c. 6.

Secondly, The King might at Common Law erect Societies or Companies for the *Maintenance, Enlargement, or ordering of any Trade of Merchandize*, and none to have Liberty to trade in such Commodities, or to such Parts as are limited, but those that are free of such Societies, or licensed by them: this appears in the Statute of *Monopolies*, which excepts such Companies out of that Law, and the *East-India Company* having Existence then, is manifestly within the Exceptions.

This Power of erecting such Societies exclusive of others, appears more antiently, 12 H. 7. The *Merchants Adventurers* of several Parts of England petitioned the King in Parliament, setting forth the Liberty they had to trade to many Places in League and Amity with the King, but that the *Merchants Adventurers* of London, exacted of them 40 l. Fine for Liberty to buy and sell at the *Marts*. The Act gives them free Passage, Resort, Course and Recourse to the *Marts* in *Flanders, Holland, Zealand, Brabant, and the Places adjoining thereto*, paying only ten Marks to the Company.

This gives no larger Liberty, only lessens the Payment for it, and but to such Places as are specified in the Act.

1 Rolls f. 4.

The Case of the *Taylors of Ipswich*, and others of the like Nature, wherein Restraints of Trade by the By-Laws of Companies have been condemned, come not within this: For 1. They are of *Inland Trade*. 2. In that case no Man was to exercise the Trade, but such as the Master and others of the Company should approve of, which might occasion a total Restraint.

Thirdly,

Thirdly, The King might erect *Staples*, or Treasuries for Commodities of home-Growth or Manufacture: and no Man could, without the King's Licence, engross Quantities of these to carry elsewhere, than to Domestick or Foreign *Staples*: Nor, as appears by the foregoing Head, could carry to the last, unless he were a *Merchant of the Staple*, or licensed by them.

The King's Power in Relation to Staples.

Vid. 12. H. 7. Sup.

Foreign Staples depended upon the King's Treaties with *Foreign Princes*; and upon any Inconveniences arising, either the King's Grant of the *Staple*, his Treaty with the Prince, or the Prince's Ambassador residing here, were to be consulted. And the Statute 18 Ed. 3. shews, that the King alone had granted a *Staple* at *Bruges*, which Grant they do not in the least question, but pray redress upon some Inconvenience which had arisen by an Ordinance made in *Flanders*.

Vid. 21. E. 3. N. 10.

22. E. 3. N. 12

& 13. 3. H. 5.

18 E. 3. Rot.

Parl. Interpet.

Com. 5.

Vid. infra.

Till the *Staples* came to be fix'd in *Parliament*, the King of his own Authority appointed them within his own Dominions, as is evident by the Statute of 2 E. 3. (which says, that the *Staples ordained by Kings in times past shall cease*) at least as this is explained by subsequent Parliamentary Proceedings.

2 E. 3. c. 2.

" The Commons 47 E. 3. petition that the *Staple* may be at *Calais*, and that no Patent or Grant be made to the contrary.

47 E. 3. N. 17.

Ref.

" The King will appoint the *Staple* as by Counsel he shall think best.

Yet it appears that before the 50th, the King had of his own Authority appointed it at *Calais*; for the Commons then, in their Complaint against evil Counsellors, desired it may be enquired of such

50 E. 3.

B

of

of the *King's Council*, as transported *Staple-Ware* and *Bullion* to other Places than *Calais*.

Nay, though it seems it had been discontinued, he had by Assent of his *Council* appointed it at *Calais* before the 47th, for in the 41st, reciting such his Establishment, he gave special License to some to carry Goods elsewhere: And the Statute of 25 E. 3. c. 2. takes special Care to preserve the *Staple* at *Calais* by a saving to that Act.

Clause 41. E.
3. n. 21. d.
Special License,
notwithstanding
a general Re-
straint.

50 E. 3. N. 53.

In the 50th of E. 3. The Countries of *Lincoln*, &c. pray that the *Staple* may be at *Lincoln*, as it was at the first Ordinance; and not at *St. Botolph's*.

'Tis answered, it shall continue at *Botolph's* at the *King's* Pleasure.

2 Dist. f. 61.

The Resolution 1 *Eliz.* that a Grant for *Malmsey* to be imported only at *South-hampton* was void, is not contrary to this Power of the *King*, in confining Trade to a particular Place: because it was by an express Act of Parliament made lawful to carry Wine to any Port: And I am treating here only of a supposed Liberty at Common-Law; and the Restraint of such Liberty.

27 E. 3. c. 6.

The Inference.

If then the *King* can prohibit Trading to any Parts of the World, but where he fixes his *Staple*, unless the Trade be opened by Act of Parliament, and yet may license some to trade elsewhere; much more may he prohibit Trading in or to some one Place, yet license others to trade there; for a Prohibition of Trade to any Place but one, or some few, certainly argues a greater Power than to prohibit, only in Relation to some particular Places.

The King's
Power to prohi-
bit even *Staple-
Wares*.

Fourthly, As the *King* might prohibit the carrying out *Staple-Commodities* elsewhere than to the *Staple*; so he might, when he saw cause, prohibit even the carrying such thither. Thus

Thus the Wool was a *Staple Commodity*, I find, a Pat. 3 E. 1. m. 22. de negotiis Mercat. Fland.
 Pardon for the Exportation of *prohibited Merchandize of Wool*, upon Submission and Fine to the King.

But because this may possibly be for trading elsewhere than to the *Staple*, this Power will not fully appear till we come to that Exception, for the King's *Prohibition*, which, as I shall shew, runs through those Statutes which are the most in Favour of *Merchants*; yet it was admitted in the Argument of *Sand's Case* against the Company, that in time of Plague, or when the Commodities are needful here, the King may prohibit the exporting even those of the *Staple*.

Fifthly, The King might prohibit the Exportation or Importation of any *Commodities* not of the *Staple*, as appears beyond Contradiction from the Petition of the Commons, 1 H. 5. with the King's Answer to it. The King's Power to prohibit Commodities not of the Staple.

“ The Commons pray that all Merchants may
 “ export to any place, or import from any place
 “ any Goods, except Goods of the *Staple*, at their
 “ Pleasure, notwithstanding any Proclamation to
 “ the contrary. Rot. Parl. 1. H. 5.

This is denied: for the Answer is,

Le Roy voet estre advise.

This indeed some will have to be occasioned by an *Embargo* in time of War: but it appears by the Circumstances of the time, that there was none then, or any immediate Preparation for one; besides if there were Wars, 'tis highly improbable that the *Commons* would pray a general Liberty of Trade.

But farther, to confirm this Power in Relation to *Commodities* which were not *Staple*: *Butter* and *Cheese* having been *Commodities* of the *Staple*, but distapled,

18. H. 6. c. 3.

disstapled, by reason of not being able to bear the Charges incident to the *Staple*; though leave was given to carry them to any place in Amity; there is an expresse *Proviso*, that the King may *restrain the same, when it shall please him.*

No such Liberty
of Foreign Trade
at Common-
Law, as Men
fancy.

Now whereas Men fancy that at *Common-Law* every Man had an entire Liberty to trade to any parts; let us consider the true State of Trade, and it will appear, that if the *Statutes* do not help (which I shall soon consider) Merchants Denizens have no Pretence to Liberty, especially against the King's Prohibition; unless it be to places where Trade is opened by particular *Statutes*; as to the Dominions of *Spain, France, Portugal, &c.* Or to *Staples*, which were at first erected by the *King's sole Authority.* Till the Statute 34. E. 3. they could not trade abroad in Person even with any *Staple Commodity*: Other Trade must be carried on with *Gold or Silver*, or with *Goods and Manufactures not Staple.*

V. 3. I. 1. c. 6.

The Exportation of *Gold and Silver*, the Kings might have prohibited at their Pleasure till 15. Car. 2.

V. 2. H. 6. con.
firmed.

17 E. 4. made
perpetual. 3 H.
7. c. 8. altered,
15. C. 2. c. 7.

And it appears by the Statute of 2. H. 6. that the *Staple* at *Calais* took in all Merchandize from hence, besides *Woollen Cloth* and *Herring*: For *Woollen Cloth* the *Staple* was at *Flanders.* So that *Herring* seemed the only Trade at Liberty: which however, being *Victuals*, was within the Reason of the Provision in the Statute of 18. H. 6. concerning *Butter and Cheese.* And the common Course of Restraints by the *King's Proclamations.*

40. Ed. 3. N.
40. d.
Victualia.

Thus I find a *Proclamation* in the 40th of Ed. 3. against carrying *Corn* or other *Victuals* from the *Ile of Wight.* to any Common or Road

Another

Another afterwards against carrying Wine out of England. 46. Ed. 3. N. 21. d.

And an Indictment in the 36th for carrying Corn beyond Sea, against the King's Proclamation. 36. E. 3. Rolls iit. Prerog.

Sixthly, The general Course of the Statutes express or imply the King's Power of prohibiting Goods and Persons. The Statutes express or imply the King's Power of prohibiting.

This does *Magna Charta* it self very plainly, and so as to serve for an Explanation unto all other Statutes concerning Merchants. *Magna Charta* c. 30.

" Let all Merchants, says it, *unless they were*
 " *publickly prohibited* before, have safe and sure
 " Conduct to go out of *England*, come to *England*,
 " and stay and go through *England* as well by
 " Land as by Water, to buy and sell without evil
 " Toll, unless in time of War, or that they are
 " of the Enemies Land.

This, as the Lord Coke rightly observes in this Particular, relates only to *Merchants Strangers*, which shews that no others were then known: If it takes in *Denizens*, then Letters of safe Conduct, or other Licenses, are requisite for them to apply for, before they can have such Liberty. According to which I find Letters of free Trading and safe Conduct to Merchants coming into *England*, *tam indigenis quam alienigenis*, as well Natives as Foreigners, 50. H. 3. Though *Merchants Denizens* are not taken notice of as trading by Sea, 9. H. 3. It seems by the 50th they who had used to enrich themselves by the Monies of *Foreigners*, fell to *Foreign Trade* themselves, and for ought appears to the contrary, did this by Vertue of Letters of *Free Trade* from the Crown; Nor was Trade wholly enlarged, 2^o. E. 3. when 'twas enacted, " That

" Mer-

Pat. 50. H. 3.
 m. 20. de Mer-
 catoribus veni-
 entibus in Angl.

2. E. 3. c. 9.

“ Merchants Strangers and Privy, may go and
 “ come with their Merchandizes into *England*, af-
 “ ter the Tenor of the *Great Charter*, which re-
 ferring wholly to the *Charter*, leaves it as it was
 before. Indeed there is likewise a Provision that
Staples shall cease, but that was but temporary ; no
 more being necessarily implied in the Word *cease* :
 However this can reach no farther than to *Staples*
 appointed before that time without restraining fu-
 ture Appointments, which appears not only from
 the Import of the Words, but by the constant
 Practice after.

Vid. sup. p. 9.

Whatever Liberty the *Great Charter* gives, it
 is to such as take Letters of *Conduct*, or at least have
 not been *publickly prohibited*.

But the Lord *Coke* must needs be under a
 Mistake, where he makes the *Publick Prohibition*
 to be no other than by *Parliament*. For unless he
 supposes all *Staples* to be taken away absolutely by
Magna Charta, contrary to the exprefs Allowances
 of following Statutes, the Kings prohibiting *Sta-
 ple* Goods to be carried elsewhere than to the *Sta-
 ple*, is a lawful *Publick Prohibition* within that Sta-
 tute. And whatever *Prohibition* is lawful, must be
Publick within the *Statute* ; for otherwise it is not
 lawful. But they that argued against the *Compa-
 ny's Charter*, admitted that the King might prohi-
 bit exporting Goods, when needful for the King-
 dom, and in times of Plague, and the like : Where-
 fore such *Prohibition* is sufficiently publick : but
 to say that the King might in such cases, but not
 otherwise, is either a giving up the Question of *pub-
 lick Prohibition*, or else a begging it, in supposing
 that others, though as publick, are not within the
Prohibition. The

The great Statute relied on for Liberty of *Foreign Trade*, is 18. E. 3. the Words of which in the 18. E. 3. c. 3. Print, are these ;

“ Every Man as well *Stranger* as *Privy*, from
 “ hence-forward may buy Wools, according as
 “ they may agree with the Seller ; as they were
 “ wont to do before. And that the Sea be open to
 “ all manner of *Merchants* to pass with their *Mer-*
 “ *chandizes* where shall please them. To shew
 how little Warrant there is, for what Men would
 gather from the Print, ’twill be requisite to set
 down the Words of the Record :

“ *Item prie la dite Com q; Come nre s^r le Roy* 18. E. 3. M]
 “ *est Grantz. as gents de Flandres qles Estaples* 12. Per. Com.
 “ *desleyns scient en la vill du Brugges, au temps de* 5.
 “ *quel grant tote manere dez. Merchandz. cest asca-*
 “ *voir, Lombards, Genevys, Cataloyens, Espai-*
 “ *nols, et autres q; la plus grand part des Leyns so-*
 “ *loient achater, at per la ou illz voloient hors de terr*
 “ *de Flandres per terr et per m^{ier} a lour voluntee*
 “ *amesner, a grant Profit et Encreas du pris des leyns*
 “ *illoques venantz, la ont les vills de Brugges, Gant*
 “ *et Ipse denovel ordeniz pur lour profit q; nuls leyns*
 “ *venantz a le Staple scient venduz as estrangers*
 “ *gentz ne carriez hors de la dit tere de Flandres,*
 “ *si com illz soloient estre en damage de Marchantz*
 “ *d’ Angleterre, et de tote la Com, dont illz prient*
 “ *remede.*

Resp.

“ *Quant au quint Article il est avis as Prelats,*
 “ *Grants & Comes du Roialm q; la Petition est rea-*
 “ *sonable, et outre assentuz est q; chescun Merchant,*
 “ *aussi bien Estrangers come Privez. peusse achater*
 “ *Leyns en Engleterre, aussi come ils soloient fair,*

“ et

“ et sur se soient faitz breifs as Viscounts de fair ent
 “ Proclamation.

“ Also the said Commons pray that since our
 “ Lord the King has granted to the People of
 “ *Flanders*, that the Staples for Wools be in the
 “ Town of *Bruges*; at the time of which Grant
 “ all manner of Merchants, viz. *Lombards*, *Ge-*
 “ *noeses*, *Catalonians*, *Spaniards*, and others who
 “ used to buy the greatest part of the Wools, car-
 “ ried them from thence whither they would, out
 “ of the Land of *Flanders* by Land and Sea at
 “ their Pleasures, to the great Profit and Encrease
 “ of the Price of Wools coming thither. The
 “ Towns of *Bruges*, *Gant*, and *Ipre* have lately
 “ ordained for their Profit, that no Wools coming
 “ to the *Staple* be sold to Strangers, nor carried
 “ out of the said Land of *Flanders*, as they used
 “ to be. To the Damage of the Merchants of *Eng-*
 “ *land*, and of all the *Commons* whereof they
 “ pray Remedy.

Answ.

“ As to the 5th Article it is agreed by the *Pre-*
 “ *lates*, *Lords* and *Commons* of the Realm, that
 “ the Petition is reasonable. And moreover it is
 “ assented that every Merchant, as well Stranger as
 “ *Privy*, may buy Wools in *England*, as they used
 “ to do. And of this, let there be Writs made
 “ to the Sheriffs to make Proclamation thereof.

Upon which it is observable ;

1st. That the King's Power of erecting *Staples* is
 allowed, and the *Staple* of his erecting is continued
 by this Statute: For though leave is given to buy
Wools any where in *England*; *Bruges* still remained
 the

the *Foreign Staple*, to which all Wools that were exported were to be conveyed.

2dly. That this being only a Liberty to buy Wools in *England*, does not in the least imply a Liberty for *Merchants* to pass abroad with their Merchandizes where it shall please them: for that would be wholly to destroy the *Foreign Staple*, which is by no means taken away: Wherefore if either the Writ to the Sheriff; or the Proclamation thereupon, mistake the Liberty there mentioned, which Merchants formerly had, to pass by Land and Sea from *Flanders*, as if it related to passing from *England*, and that through the Inadvertency of the Compiler of the Statute-Book, be foisted in for the Act of Parliament, I am sure it neither is, nor ought to be of any Avail.

And 'tis further to be considered, that even that Liberty which is given by this Act to buy Wools any where in *England*, is restrained by the Statute of the *Staple*, nine Years after, which erects *Staples* in several parts of *England*, to which all Wools, &c. which shall be carried out of this Realm shall be brought. Nor are they according to that, to be exported by *Merchants Denizens*.

27 E. 3.

Nor do the Statutes 25 E. 3. & 2 R. 2. which provide that *Merchants Aliens*, and *Denizens* may buy and sell all things vendible, of and to whom they will; amount to a general Liberty for *Foreign Trade*. For,

1. There is a saving to the *Staple* of *Calais*.

2. The Title and Preamble shew, that 'tis only to buy and sell *within the Realm* without Disturbance.

C

25 E. 3. c. 2. 2 R. 2. c. 1.
Mem. in Horn. & Juy's c. 1. Syn-
derv. fo. 441. It is held by some that
at Common Law the King might pro-
hibit the importing of Goods: And if
it be done contrary to the Prohibition,
the Ship which carries them shall be
forfeited. But this is falsely supposed
to be altered by these two Statutes.

3. The

3. The Remedy is only against Disturbances in *Towns &c.* within the *Realm*.

15 Car. 2. c. 7. The only Refuge that I am aware of, is, *The Act for Encouragement of Trade*, 15 Car. 2. and some others of the like Nature. In that there is a Liberty given for exporting Corn or Grain when at certain *Prizes*, into any *Places beyond the Seas as Merchandize*. But 1. This being for *Merchandize*, can reach to no other places besides those whose Trade is lawful. And as no Man can say that by this Act they may send this to an *Enemies Country*; neither, if the King may by Law prohibit sending to any other, may it be sent thither. Wherefore the publick Prohibition excepted in *Magna Charta* must needs run through this Act. 2. The Statute says only, notwithstanding any *Law, Statute or Usage to the contrary*, but provides not against future *publick Prohibitions*.

The Clause which enacts, that no *Commodity* of the Growth, Production or Manufacture of *Europe*, shall be imported into any part of *Asia, Africa* and *America*, unless in *English Bottoms*, with the Master and three fourths of the *Mariners English*, gives no Liberty for all People to trade thither; but only requires the lawful Traders thither to go with *English Ships*, and such a Proportion of *English-men*. Of the same Nature is the Provision concerning Goods or *Commodities* of the Growth Production and Manufacture of *Africa, Asia*, or *America*, 12 Car. 2.

The Act for the encouraging Navigation, 12 Car. 2. c. 18.

The King's Power of prohibiting upon Pain of Forfeiture.

Seventhly, The King may by his Prerogative, entrusted with him for the Good of his People, prohibit the Exportation or Importation of certain *Comodities*, upon Pain of Forfeiture of the

the Goods, and Ships which carry them.

Edward the third commanded that no Merchant ^{41 E. 3. m. 21.} ^{dorso.} Denizen should transport Cloth of Worsted, nor Merchant Denizen or Stranger, Coals, Sea Stones Fell-Ware, &c. to other Places than Calais, *sub forisfacturâ Bonorum et Merchandizarum*, under Forfeiture of the Goods and Merchandizes.

This is likely to have been according to former Precedents of *Staples*: for whereas the Statute 2 E. 3. says, "*Staples* ordained by Kings in 2 E. 3. c. 9. "times past shall cease; So it says of the *Pains* thereupon, *Provided*. And the 27th enacts, 27 E. 3. c. 27. "That all who shall be convict that they have "brought Wools, Leather, and Woolfells to the "Parts beyond the Sea, against the Defence of the "Proclamation thereof made, before the making "this Ordinance, shall be judged to prison, and incur the Forfeiture of the same Wools, Leather, "or Woolfells, and all other their Goods and Chattels, and moreover be ransomed at our Will.

Now I appeal to all rational Men, whether it is not more likely that there had been such a Penalty in the King's *Prohibition*, and that it was here confirmed by the *Parliament*, than that they should make a Penalty *ex post facto*, or encrease the Penalty before set.

But for the King to prohibit upon Pain of Forfeiture was very frequent in that time, and as here it had a Parliamentary Allowance, so had it a judicial one in the foregoing Reign.

A Charter had been granted to Great Yarmouth, *vid.* 2 E. 3. that all Ships coming within the Haven, shall be discharged there, upon Pain of Forfeiture of the Goods. This had been adjudged valid before the

vid. f. 26. b.

Council of E. 2. which being at a time when the *Council* was chosen in Parliament, carries as much Evidence of the Law of that time, as any thing can. Indeed *Little Tarmouth* in the time of E. 3. insisting upon the same Priviledg by another Charter, as it had done before the *Council* of E. 2. The Debate of that matter is adjourned to *Parliament*.

40 E. 3. N.
40. d.

Exporting Corn from the Isle of *Wight* was prohibited upon Pain of Forfeiture, 40 E. 3.

So. 46 E. 3.
N. 21. d.

Exporting Wine from *England* upon the like Pain, 46 E. 3.

Claufe 3 E. 1.
N. 7.

And long before this, *Foreign Merchants*, without mention of any War, had but 40 Days given them to sell their Wines in *London*.

And, as his present *Majesties Proclamation* prohibiting the Importation of French Goods, and requiring the Sale of them by a convenient time to come, upon Pain of *Forfeiture*, and this without any Declaration of War but only for the Publick Good, is another great Authority on the *Companies* Side: So the *Proclamation* of 3 E. 1. is a Precedent in Point to justify the last; for no Man can doubt but *Foreign Merchants* had their Goods as much under the Protection of our Laws, as Natives had or have.

The King having
Power to prohibit,
the Forfeitures incurred by
the Marine
Laws, take
place.

But admit that the King could not by his *Proclamation* create a *Forfeiture*, so to be adjudged in *Westminster-Hall*; yet it being in Relation to Fact arising upon the *High Sea*, or the Ports beyond the Seas, falling within the *Admiralty Jurisdiction* and *Marine Laws*; if the King may by Law prohibit, then whatever Penalty the *Marine Laws* inflict upon Persons or Goods, going contrary to *Imperial* or *Regal Prohibitions*, the same are allowed of in our
Laws:

Laws: Nor will it be any Objection to say that the Penalty is occasioned by the *Prohibition* in the *Charter*: for it is not supposed that barely trading thither is against the *Marine Laws*, unless such Trade were before prohibited.

As early as the time of *Rich. 1.* I find that *omnes per mare ituri*, all Persons going by Sea, were subject to the *Admiral's Jurisdiction*. Hoveden f. 666.

And parts beyond the Seas are within the same. Vid. Crook Car. f. 216. ib. f. 438.
The great *Hales* when he was of *Counsel* in a cause against the *Admiralty*, did not except against such Power; only that a Contract at *New-England* was not alledged to be in *partibus transmarinis*. But 9 H. 4. N. 63. Ld. Admiral tinent ses Courts sur mer ou costs de mere etnemi deins franchise ne vill.
this Jurisdiction is proved at large by Mr. *Pryn*, in his *Observations upon the 4th Institute*. Pryn's Animad. on the 4th Inst. Rot. Pat. 31. E. 1. no. 16.

The Kings Power at Sea, is more absolute than at Land, as appears by a memorable Record, 31 E. 1.

“ It was then agreed by the *Lords and Commons*
“ and the *Deputies of Foreign Princes*, that the
“ *King of England*, by Reason of his *Kingdom of*
“ *England*, has enjoyed the *Supream Dominion*
“ and *Empire* in the *English Sea*, and the *Islands*
“ thereto belonging, and may constitute whatever is
“ necessary for the preserving *Peace, Justice, and E-*
“ quity, as well among *Foreign Nations* as his own
“ *Subjects*; and may judg accordingly, and do all
“ things belonging to *summum Imperium*. Selden's Mare Clausum.

The *Admiral's Patents* are to try *secundum Legem* Pat. 4. H. 6.
Maritimam, according to *Maritime Law*; and *Mari-*
time Law or *Law Merchants*, is by the *Chancellor* in
E. 4th's time, held to be the *Law of Nature*, which 13. E. 4. fo. 9. b.
is *Universal throughout all the World*.

Where-

Wherefore according to this, the King has in these matters *summum Imperium*, without the Fetters of positive Laws of particular Nations.

But as far as the Provisions reach the Law of Oleron made by R. 1. as he came from the Holy Land, is the Law of *Merchants* throughout the World, and the Law of Nations therein; and I find Provisions made for Trials by the Law of Oleron, and ancient Laws of the Seas: and 4 H. 4. Persons to be punished according to the Custom of the 5 Ports, which had a Collection of some Sea Laws.

Mare Claus. f.

254.

Pryn. upon the

4th, Inst. fo. 81.

Rot. Parl. 4 H.

4. A. 47. 48.

H. 3. 27. d.

Laws of Oleron,

c. 47.

Zouch de jure

Maritimo, p. 20.

si res illicitæ in

navem posita

sunt, Navis fisco

vindicatur.

By the Law of Oleron, Pyrates, Robbers and Sea-Rovers, may be despoiled of their Goods without Punishment. If this will not reach *Interlopers* as Sea-Rovers, at least the Civil Law, which is another Guide to the Admiral's Judgment, will.

If, says the learned Professor of the Civil Law, Dr. Zouch, things unlawful are put into a Ship, the Ship is forfeited. Again, he tells us Traders are proceeded against in Judgment, if they venture to go to buy or sell beyond Places prescribed; and the Goods brought from thence are to be forfeited, and the Contractors to be subjected to perpetual Punishments. And 'tis evident that for this he has the Warrant of the express Letter of the Civil Law.

Thus we find in the Codex.

* *Just. Cod.*

Lib. 4. tit. 40.

Comparandi se-

rius a Barbaris

facultatem omni-

bus, sicut jam præceptum est præter Comitum Commercio etiam jubemus auferri.

N. All that were not of the Roman Empire or Grecians, were counted Barbarians:

So Foreign Trade, or Trade with Foreigners prohibited.

* " We now command, as was formerly done, that Liberty of buying Silk from Barbarians be taken from all Persons except the Supervisor of Commerce.

Again,

Again.

† “ Merchants, as well our Subjects as those of the King of Persia ought not to buy or sell out of those Places which were agreed to, at the time of the League with the said Nation. If this be done knowingly by either of the Contractors, the things sold or gained elsewhere than in these Places, are forfeited.

† Codex. Lib. 4. Tit. 63. n. 4. Mercatores tam imperia nostro quam Persarum Regi Subjectas, ultra ea loca in quibus federis tempore cum memoratâ Natione nobis convenit nundinas exercere minime oportet, sciente utroque qui contrahit, species quæ præter hæc loca fuerint vinundatæ vel comparatæ sacro ærario vindicandas, et præter earum rerum et pretii amissionem quod fuerit numeratum vel commutatum, ex illis se penæ sempiternæ subdendum.

“ And besides the Loss of these things, and of their Price, which was paid in Money or Goods, they are to undergo perpetual Banishment.

Again.

|| “ If any Persons are apprehended either going beyond the Cities mentioned in the ancient Laws, or receiving Foreign Merchants, without a Supervisor of Commerce, they shall neither evade the Forfeiture of their Goods, nor the Penalty of perpetual Banishment.

|| Ib. n. 6. Si qui inditas nominatim vetustis legibus civitates transgredientes, ipsi vel peregrinos Negotiatores sine Comite Commerciorum suscipientes fuerint deprehensi, nec proscriptionem honorum nec penam perennis exilii ultro evadent.

Upon all which Authorities, I think it no strained Conclusion, That if the King may prohibit Foreign Trade in any case, (and all must agree that he may in some, for the Publick Good) he may in such case prohibit it under the Penalty of Forfeiture of Ship and Goods; especially if he direct that they shall be proceeded against by the Admiralty's Jurisdiction, which is provided for by late Charters to the East-India Company.

I must not here pass by the Case of Horn and Juy, which seems to lye in my way: There indeed the

1 Syderf. f. 441.

the seizing a Ship as forfeited by Virtue of a *Charter* to the *Canary Company*, is held unlawful. But it is to be considered; 1. That it was without Legal Process. 2. The Justification of the seizing was without Warrant: only by Commandment from the Company, which could not be sufficient. 3. The Statute 3 I. 1. had enabled the *Subjects of England* to trade freely into the *Dominions of Spain*. And the Distinction took by the Judges then, that the *Canaries* were of the *Dominions* of the King of *Spain*, but not of *Spain* it self, might be true; yet it is not likely that the Parliament intended a nice Enquiry into the several Tenures, or the Titles which the King of *Spain* had, to all the Parts of his *Dominions*. 4. But, be this Authority never so express, the *Reporter* assures us some held otherwise: Nor could the unanimous Opinion of the Court of King's Bench, be enough to turn the Stream of the greater Authorities which I have produced.

Second Charge
of Power over
Life.

The Power over Life exercised under the King's Authority, is of greater sound, but not of any higher Nature, than the foregoing: For according to the Degrees of Power over Property, so it must by Consequence be over *Persons*: And it will be no harsh Supposal, that if the King is not tied to the Rules of *Common Law* in Relation to *Foreign Trade*; neither is he as to the *Persons* of such *Traders*.

But to come more particularly to the Facts which occasion this Question: They are either Judgments of Death upon Trials had, in Pursuance of the Powers given by the *Charter* to the *Governors* upon the Place; and these Powers duly pursued, or not; or else the like Judgments upon *Trials* had

had by particular Commissions for *Martial Law*.

If the Powers of the *Charter* were duly pursued, then the only Question will be, whether the *King* may give a Power to judg upon the Place, such as transgress the Laws either of *England*, or *by-Laws* made for that Place? If he cannot do this, 'twill be impossible to preserve any Foreign Plantations; and besides *New-England*, and all other *English Colonies*, have acted unwarrantably from the Beginning.

If the Powers in the *Charter* have not been duly pursued, that will be the Fault of the *Governor* entrusted with the Execution of them, but not of the *Company*, unless it appear that they have given such Instructions, which neither did nor could appear, in their Case who were tried by the Governour at *St. Helena*: It being immediately upon their Rebellion, before there could come any Orders from hence concerning them.

The heaviest part of the Charge, is, that of a Commission for *Martial Law*; which 'tis supposed that the *Company* obtained; & that some of the Committee gave Instructions to have it put in Execution.

For this 'tis requisite to give a short Account of the Inducements to that Commission.

The People of *St. Helena* having risen to a Competency on a suddain, from the Grant of the *Company*, had grown insolent with their good Fortune, and impatient of any Government; and four times rebell'd against the *King's Authority* administered by the *Governours* there, meerly for Rebellions sake, before they had any manner of Charge laid upon them for Maintenance of the Government: being only required to defend it with their

Bodies, and such Arms as were given them by the Company; for which end they were bound to keep Guard in their turns, as well as to rise in general upon occasion: They having taken a Distaste at the Deputy-Governor, upon the false Suggestions of the most Seditious among them, came down to the Fort in an hostile manner, demanding the Deputy-Governor to be delivered up to their Fury; and it being refus'd, endeavour'd to force open the Gate.

Some would justify their Recourse to Arms, because the *Company* finding more need of Defence against them than against Invaders, had been obliged to send Souldiers for securing the Peace; and discharging them from their ordinary Attendance, had required the Payment of one Shilling *per Acre* for this necessary Support of the Government. Whereas 1. There was no Stipulation with them that they should have any Vote or Interest, in the making any Laws or Provisions about the Governments: However, 2. This which they would make a just occasion, was not done till it was necessitated by this very Rebellion, which thus they would legitimate by way of Prophecy.

The Rebels (for such they were against the King's Power administred there) being disperfed by the *Company's* Souldiers, some of them were taken and tried, and if the Witness produced against the *Company*, swore true, they were notwithstanding found guilty but of a Riot or Tumult. Which shews how little Justice was to be expected, when it was to be had by means of some of the Inhabitants. However they being taken in actual Rebellion, the *Governour* having by the

Charter fo. 121. King's Charter, [“ In Case of Rebellion, Mutiny,
“ or

“ or Sedition, as large and ample Power as any
 “ Captain General of the King’s Army by Virtue
 “ of his Office ;] hang’d some for Examples, and
 detaining others in Prison, sent a Narrative of the
 Fact signed by others of the *Council* there; upon
 which Narrative, the then *King* thought fit to issue
 out his Commission of *Martial Law* for Trial of the
 rest, who were tried accordingly, and some executed.

That this Trial by *Martial Law*, is warranted
 by the Law of *England*, will appear beyond Con-
 tradiction: it being for a Fact committed *beyond*
the Seas. For,

1st. At Common Law the *Constable* and *Mar-* 13 R. 2. Stat.
shal have the sole Jurisdiction, in criminal 1. c. 2.
 Causes arising from *beyond the Seas*, as appears by
 the declaratory Stat. 13 R. 2. which says,

“ To the Constable it pertaineth to have Cogni-
 “ zance of Contracts touching Deeds of Arms and
 “ War out of *England*.

And indeed ’tis evident by numerous Authori-
 ties, that the Courts at *Westminster* could not take
 Cognizance of such Fact; to mention but one, as
 early as E. 2. ’tis held without Con-
 tradiction, that to a Fact done out
 of the Jurisdiction here, or out of the
Realm, as at *Paris*, or else where be-
 yond Sea, I ought not to answer.

The *Constables* Commission refers
 to the Practice in the time of W. 1.
 and since, and shews that the Pro-
 ceedings there, have from the earliest
 times been in a *summary* way, without
 regard to our forms of Law. And
 it is held by *Prisot*, 37 H. 6. and

18. E. 2. f. 613. Al fet fet hors de
 jurisdiction de cūz ou hors de realm
 si come a Paris ou ailleurs oustre mīer
 jeo ne deit respond.

Vid. the Comis. to Earl Rivers,

7. E. 4.

Ab antiquo, Viz. tempore dicti Do-
 mini Gulielmi Conquestoris Progenito-
 ris nostri seu aliquo tempore citra,
 etc. summarie et de plano et sine stre-
 pitu et figura judicii.

Vid. Spelman Glof. tit. Constab.

37 H. 6. f. 20. b.

not denied, that the Proceedings before the *Constable* and *Marshal* are to be by the *Civil Law*.

2. This Power for exercising *Martial Law*, is not taken away by any Statute. The only Statutes which may be supposed to affect it, are 26 H. 8. c. 13. and 35 H. 8. c. 2. both of them for Trial here of Treasons committed *beyond the Seas*; and that part of the *Petition of Right*, which concerns the Exercise of this Law.

Neither of which take away this Power; for it being a Power at Common Law, those Statutes of H. 8. which authorize Trials here, by no means
 4 *Instit. f. 124.* remove it, as is held by the *Lord Coke*. And that manifestly agreeable to the course of Authorities in the like kind; there being no *negative clause*, providing that such Trials shall not be had *elsewhere*, or in *other manner* than what is there enacted.

That the *Petition of Right* does not touch this, is as plain: for,

*Petition of
Rights, 3 Car. 1.*

“ The *Petition* is only against the assigning and appointing Commissioners, with Power and Authority to proceed *within the Land*, according to the Justice of *Martial Law*.

2. It is not against proceeding for Fact, arising out of the Land, but such only, for which Men were by Law punishable here, by *Magna Charta* and other Statutes declaratory of the Common Law, before the Statutes 26 and 35 H. 8. whereas *Martial Law* was within *Magna Charta*, and those other Statutes, part of the Law of the Land, in Relation to Fact arising from *beyond Sea*. And whereas the *Petition* says, “ No Persons were exempted from Punishments to be inflicted according to the Laws and Statutes; It shews that
 it

it speaks only in Relation to Fact arising here ; for otherwise they were exempted.

3. But farther, that the Petition of Right was never intended to touch the *Constables* or *Marshals* Common-Law-Jurisdiction, appears from the Debates which induced the *Petition*.

“ I agree, says the Learned *Banks*, then *Attorney General*, and afterwards *Chief Justice* of the *Common-Pleas*, in some particular Cases the *Martial* hath Jurisdiction, as in matters whereof the Common-Law can take no notice, *being done out of this Realm, and also for the Treasons and Murders beyond Sea.*

Vid. Russ. Hist. Col. Append. f. 77.

I need not labour to prove, that the same Power which the *Constable* and *Marshal*, or either of them, had at the Common Law, may be granted to several Commissioners : The Substance of the Power not consisting in the Name or Number of Officers : and I think no Man will question but the present *Lords Commissioners for the Great Seal* had, before the late Statute concerning them, all the Power which the *Chancellor* or *Keeper* had, at the Common-Law.

Commissions for the executing *Martial Law*, have been frequent in most Reigns, and such as are full Precedents for that *Commission* which was executed at *St. Helena* : To make which evident, I have in the *Appendix* transcribed one at large, granted even in Queen *Elizabeth's* time, and refer to another of the like kind, in the time of *J. 1.*

Vid Append.

It may be said, That it is not agreeable to the *Martial Law*, that others joining with *Souldiers*, should be punished as *Souldiers*. To which I answer :

Object.

That

Answ. 1.

That though this might be a question in other Cases, yet it can be none in the Case of open Rebellion, where Rebels make themselves *Souldiers*. And it is observable that the *Petition of Right* makes no Provision against the Trial of such, even for Facts committed here: for it mentions only

Vid. Crook. Jac. f. 495. No Treason can be pardon'd but by express Words mentioning it.

Murthers, Robbery, Felony, Mutiny, or other Outrage or Misdemeanor, proceeding from the higher to the lower Crimes: but *Treason* is neither included in them, nor ever placed in the Rear.

N. They were not discharged from this till afterwards.

2. The Planters at *St. Helena* might well be look'd upon as *Souldiers*, not only as they were in open Rebellion, and went thither as *Souldiers*; but by the Constitution of the Place, were bound to ordinary Duty by Day and Night, in their turns, with the Companies Arms; had their several Posts assigned them, and were to attend upon all Alarms at the firing of a Gun.

Object. 2.

It may further be said, That Martial Law ought to be exercised only *flagrante bello*. But then there would be little Difference, if any, between a Fact committed here, or beyond Sea: for the *Petition of Right* allows it here in time of War; condemning only the Exercise of such a Power as it agrees to be used *in Armies in time of War*. But matters hapning abroad, being triable by Martial Law here, or by Commissions from hence, 'tis evident that there must be time allowed for Informations; which being from a great Distance, cannot be speedy.

If it be said, That the Governor might have exercised this Power upon the Place, perhaps it may be better that he should stay for Orders from hence; than that so large a Power should be used at his Dis-

Discretion. Besides till he was reinforced from *England*, and Pardons were sent from thence, which several imbraced to the breaking the Party which had conspired and acted together, he wanted Power to execute such an Authority.

But did not the Common and Statute Law of the Land, the Civil Law of the Romans, or other Maritime or Marshal Laws, afford sufficient Matter for an Apology, we might have Recourse to the Foundation of them all, and what upon Emergencies superseeds all, the *Salus Populi*: To which the Interest both of Prince and People must give way; whenever there is a Competition.

It is necessary that this should be preserved: And the Law of Necessity is ever held superior to Forms and Provisions for common Cases. This indeed is duly taken by the Lord *Hobart* to be a Law only for the instant Time. But if it does appear that the *East-India Company* is for the Benefit of the Publick; and if the Powers which it exercised by Grant from the Crown, were at the respective times of using them, necessary to preserve their Trade or Interest in those Places, which they had obtained from the Crown, or their own Acquisition allowed by that: then this may plead their Excuse for what was done in such Circumstances: though indeed it be no Argument that such Powers should be constantly exercised for the future, without a Parliamentary Establishment. That an *East-India Company* is for the Good of the Nation, is now past Controversy, and is not only admitted on all sides; but they who would destroy this, would be of a new one, that themselves might share in the Spoils of the Old. If therefore the

*Necessitas est
Lex temporis
scilicet instantis.
Hobart.*

the destroying this, the taking from its Credit, or lessening the Powers which it has; though the like Powers should immediately be vested in another; may indanger the Loss of Trade, or Diminution of the *English* Interest in *India*; then 'tis certain 'twill be more expedient that the old Company should have a Supply of such Powers as are supposed not to be Legal, than that it should be lessened in any Respect.

If this Company were dissolved, then whatever Advantages are gained by any Treaties with the *Indians*, or by their own prudent Management among them would cease.

Nay whatever tends to the sinking its Credit, not only makes the Trade with the *Indians* to be upon more disadvantageous terms, but gives such an over-Ballance of Credit to our too powerful Competitors, as perhaps may not be retrieved again in some Ages. The denying the *English* Company that Power, which is exercised there by others, would deprive it of means necessary to its Preservation. It being impossible that a People at such Distance can receive Laws from hence for all Emergencies, timely enough to obviate their Designs, who act by full Power upon the Place. And the very transferring this Power to another Company, but newly entred upon the Methods of advancing its Interest in the *Indies*, may occasion the hazarding that publick Benefit, which the Nation is now in Possession of. Nor ought it to be put upon the chance of an uncertain Experiment.

But what arises from the Political Consideration of this matter, has been already set in so clear a Light, by an Hand the best able, that for me to add

add any thing further, might be but the casting cold Water upon Arguments, which could not otherwise fail of maintaining a warm Impression in the Readers.

If it be said, that the Parties over whom this Power has been exercised, were *English-Men*, and carry the Rights of such along with them.

The Objection from the Consideration of being English-Men, answered.

'Tis certain, these cannot be enjoyed in all Places; for then they would have the same in the Dominions of other *Princes*, notwithstanding the local Allegiance due by the Law of Nations, by reason of *Protection*, according to their respective Laws.

If Men will venture their Lives and Fortunes beyond the Protection of the *English Laws*, 'tis at their own Peril, and they must submit to the Consequences of it; and what those Consequences may be, will the better appear if we consider the Nature of those Places from whence the Questions arise.

They had been granted to the *Company* from the *Crown*, reserving the *Sovereignty*: And were either

1. Such Plantations or Colonies as King C. 2. had with his *Queen*, formerly belonging to the King of *Portugal*; which being the *King's* in his personal Capacity, and never annexed to the *Crown of England* by any Act of *Parliament*, were evidently no part of the *Dominion of England*.

N. Anno 1667. Upon a Reference to the Judges by the House of Lords concerning the Canary Trade, they declared, that though the Canaries were the Dominion of the King of Spain, they were no part of the Dominion of Spain.

2. Such as were gain'd by primier *Occupancy*, as not being prepossess'd by the Subjects of any other Government.

3. Acquired by Conquest absolute, or upon terms.

4. By Purchase for Goods or Mony, or by the way of Exchange for Lands or Territories.

E

That

That of Purchase, may fall indifferently under the same Consideration either with absolute Conquest, or with that upon terms; according to the Nature of the Purchase, or thing purchased. *Occupancy*, under the same with *absolute Conquest*; because there were none to make Terms for themselves. And if the Agreements between the *Conqueror* and the *Conquered* have the force of Laws, by Parity of Reason where there is no Agreement, as in Places gain'd by *Occupancy* or absolute *Conquest*, the Prince's Pleasure sufficiently declared and made known, will have the same force.

Though the *Sovereignty* of what Subjects gain by the Sword, or Purchase, accrues to the *Prince*; it is not so clear, that the *Prince* acquires for his Subjects; for then that Acquisition which *W. 1.* made by his Victory over *Harold* would have rendred *England* an Accession to *Normandy*, as our present *Sovereign's* Victory over *J. 2.* would have subjected *England* to the *Low Countries*.

If indeed an *absolute Conquest*, leaving no Property to the Natives, were carried on at the charge of a Nation, or of any Body Politick, or single Persons, such would have a fair Pretence to a Legal Interest or share in the Soil, though not in the *Sovereignty*. But when the *King* gains a *Sovereignty*, where the People in general have no Pretence of Interest in the Property, it may be a question whether the Laws of Property here, and for securing Liberty, which follows that, can be of any force there. And whoever transplants himself without any Property, must be presumed to submit to the Laws and Customs of that Place where he expects to gain one.

The only Question material here, as giving
Light

Light to the rest, is, what, according to our Law, is the Effect of *Conquest upon Terms*; That in such case the former Laws and Customs of the conquered Country remain, if stipulated for, appears from the Nature of the thing, and is confirm'd by our Law; of which *Wales* affords a plain Instance: that anciently had been Feudatory to *England*, and afterwards conquer'd by *E. 1.* that which is called the Statute of *Snodon* or *Ruthland* is manifestly no Act of an *English* Parliament, but an Agreement between the King and them; wherein he approv'd and allow'd of some of their old Laws, and alter'd others by the *Advice and Consent of his Peers* that were with him at *Snodon*; which being in *Wales*, 'tis not likely that an *English* Parliament should be summon'd thither; nor are any Footsteps of one to be found. Nay, though *Wales* was afterwards by Act of Parliament incorporated and annex'd to the Realm of *England*, and it was provided that they should enjoy all Rights, Laws, and Liberties, as the Subjects of this Realm, notwithstanding any Act, Statute, or Usage to the contrary: Yet it has been held, from the Title of the Act, That many *Welsh* Customs remain, the *English* Form of ministering Laws and Justice being observed.

Vid. Stat. of Ruthland, 12. E. 1. Practica Wallia.

Vid. Vaughan of Process into Wales. f. 444.

N. The Title in Keebles Collection is wrong.

Vid. Dyer 363. b.

But there was no Question but till the making that Act, all the *Welsh* Laws and Customs allowed at *Ruthland* were in full Force. And this, tho *Wales* had been conquered at the Expence of the *English* Nation; (which cannot be said of any part of the *Indies*) and is by the Statute of *Ruthland* declared to be united to the Crown of *England*, as a part of the same Body. And whatever *English-man* went to inhabit in *Wales* before the Act of Union, particularly introducing the *English*

Laws; though he were within the King's Dominions, yet was he subject to the Laws and Customs of *Wales*.

Nay farther yet, *W. 1.* gave Power to several of his great *Lords* to conquer what they could from the *Welsh* Nation. Of which, to use the Words of the learned Judg *Doderidge*;

'The said Lordships and Lands so conquer'd, were
'ordain'd *Baronies-Marchers*, and had a kind of
'Palatine Jurisdiction erected in every one of them,
'and Power to *administer Justice* unto their Tenants
'in every of their Territories; having therein
'Courts with divers *Priviledges, Franchises* and *Im-*
'*munities*: So that the Writs of ordinary Justice
'out of the *King's* Courts were for the most part not
'currant among them. Nevertheless, if the whole
'Barony had come in Question, or that the Strife
'had been between two *Barons-Marchers*, touching
'their Territories or Confines thereof, for want of
'a Superior they had Recourse unto the *King their*
'*supream Lord*. And in these and such like Cases
'where their own Jurisdiction failed, Justice was
'administred to them in the superior Courts of this
'Realm.

*M. 9. E. 1.
Coram Domino
Rege Rot. 35.
Gilbertus de
Clare Comes
Glouc. qui cla-
mat tenere ter-
ras suas in Gla-
morgan sicut re-
gale quidvis,
&c.*

I find a memorable Record of this matter, 9. *E.*
1. before the King in *Council*.

Gilbert of Clare, Earl of Gloucester, who claim'd
to hold his Lands in *Glamorgan*, *sicut regale quidvis*,
as any thing Royal, or any *Royalty*, by Order of
the King was required to answer a Suit or Com-
plaint against him. " But he pleads that he holds
" those Lands, *of his own and his Ancestors Con-*
" *quest*: by reason of which he conceiv'd that he
" ought not to answer any one for any matter
" from thence, without the Judgment of his *Peers*
" of

“ of *England, and of the Marches of Wales* ; who
 “ use the same Liberties in their *Welsh* Lands. And
 “ I find it rested here.

In the 20th of the same King, in the great Case between the Earls of *Glocester* and *Hereford*: A Jury of Peers and others being summon'd; the Peers not only refuse to be sworn, as being against their Priviledg, but say, *No like Royal Mandat ever came into those parts for Causes concerning the Marches, to be tried otherwise than according to the Usages and Customs of those parts.* *Placita Parl.*
20. E. f. 77.

Thus it appears that not only the King's, but the Subjects Conquests, enjoyed their peculiar Laws and Customs.

As I know not that I ever opposed any *Royal Prerogative* warranted by *Antiquity* or *immediate Necessity* : neither do I, that I have here advanced any, not so warranted.

But if both Common and Statute Law, yield such Countenance as I have shewn, for the King's prohibiting to trade to particular Places, all but such as he thinks fit, upon the Penalty of forfeiting Ship and Goods ; and that this Forfeiture may be taken, at least under the Admiralty-Jurisdiction granted to the Company : If Martial Law in Relation to Fact arising beyond the Seas, may be exercised according to the Rules of the Civil Law, and it appears not that the Company have gone beyond those Rules : If yet farther the Rights and Priviledges of *English-men* may receive Alteration, according to the Place to which they come, though within the King's Dominions ; then to punish any Member of the Company, for procuring or acting under such Powers as have been complained of, may seem very hard.

APPE N-

A P P E N D I X.

A Commission for Martial Law, granted to a Governor chosen by the East-India Company, 43 Eliz.

‘**E**LIZABETH by the Grace of God, Queen
 ‘ of *England, France and Ireland*, Defender of
 ‘ the Faith, &c. To our Trusty and well beloved
 ‘ *James Lancaster* Esq; greeting. Whereas divers
 ‘ of our loving Subjects have been humble Petition-
 ‘ ers unto us, for our Royal Assent to be granted
 ‘ unto them, that they at their own Adventures,
 ‘ Costs and Charges, as well for the Honour of this
 ‘ our Realm of *England*, as for the Increase and Ad-
 ‘ vancement of Trade of Merchandize within the
 ‘ same, might Adventure and set forth certain Voya-
 ‘ ges to the *East-Indies*, with a convenient Number
 ‘ of Ships and Pinnaces by way of Trafique and
 ‘ Merchandizing. We graciously inclining to their
 ‘ humble Petition in that behalf, and favouring so
 ‘ good a desire and honourable Enterprize, have been
 ‘ pleased to give License to our said Subjects to pro-
 ‘ ceed in the said Voyages; and for the better enabling
 ‘ them to establish a Trade into and from the said
 ‘ *East-Indies*, have by our Letters-Patents, under
 ‘ our great Seal of *England*, bearing Date at *West-*
 ‘ *minster*, the last Day of *December* last past, incor-
 ‘ porated

'porated our said Subjects by the Name of the Go-
 'vernour and Company of the Merchants of *London*,
 'trading into the *East-Indies*, and in the same Let-
 'ters, Patents, have given the sole Trade of the
 ' *East-Indies* for the Term of fifteen Years, with di-
 'vers Priviledges and Immunities mentioned in the
 'said Letters Patents, as therein more at large it
 'doth and may appear. And whereas by Virtue of
 'our said License and Letters-Patents, so by Us grant-
 'ed to them, they have prepared and furnished for
 'this first Voyage towards the *East-Indies*, four sever-
 'ral Ships, with a convenient number of Mer-
 'chants, Mariners, and other our said Subjects, to be
 'used and imployed in the said Voyage, and have
 'chosen you the said *James Lancaster* to be the prin-
 'cipal Governor or General of all the said Mer-
 'chants, Mariners, and other our said Subjects;
 'which are or shall be shipped in any of the said
 'Ships: We graciously favouring the said Enter-
 'prize, and approving and allowing of their choice
 'of you to the said Government, being desirous to
 'furnish you with *all fit and convenient Power and*
 ' *Authority to rule and govern all and every our Subjects*
 ' *imployed in this Voyage*, by a due Obedience to be
 'by them yielded unto you in the observing and exe-
 'cuting of all good Orders and Constitutions, as you
 'shall think convenient *to ordain and appoint*, for the
 'furtherance of the said Voyage, to the Honour of
 'Us and our Realm, and for the Advancement of the
 'said Trade. We do hereby straitly charge and com-
 'mand all and every Person and Persons, imployed,
 'used, or shipped, or who shall be imployed, used,
 'or shipped, in this Voyage, in the said four
 'Ships, or any of them, to give all due Obedience
 'and Respect unto you during the said Voyage, and
 'to

'to bear themselves therein one towards another, in
 'all good Order and Quietness, for avoiding any
 'occasion that might breed Mutiny, Quarrels or
 'Dissention amongst them, to the Hinderance of the
 'good Success which is to be hoped for through God's
 'Providence of the said intended Voyage, and in De-
 'fault of such Duty and Obedience, to be performed
 'towards you, and for the Correction and quench-
 'ing of such Mutiny, Quarrels or Dissentions that
 'shall or may grow or be moved by the Disorder,
 'evil Dispositions, or Perverseness of any of the said
 'Persons: We do hereby authorize you, to chastize, cor-
 'rect and punish all Offenders and Transgressors in
 'that behalf, according to the Quality of their offences,
 'with such Punishments as are commonly used in all
 'our Armies by Sea, when the Offences are not capi-
 'tal; and for *Capital Offences*, as wilful Murder,
 'which is hateful in the sight of God, or notable
 'Mutiny, which is an Offence that may tend to the
 'Overthrow of the said Voyage, the same being
 'truly and justly proved against any of the Person or
 'Persons aforesaid; We do hereby give unto you
full Power and Authority to use and put in Execution
our Law, called Martial Law, in that Behalf: and these
 our Letters shall be your sufficient Warrant and
 Discharge for the doing and executing of all and
 singular the Premises. In Witness whereof we have
 caused these our Letters to be made Patent. Witness
 our self at *Westminster*, the 24th Day of *January*,
 in the 43^d. Year of our Reign. *1600*

HUBERD.

Vid. Commission
6. Jan. 9. Jac.
 1.

Another of the same Nature was granted by J. I.
 in the ninth of his Reign.

F I N I S.

